No. 321

In the Supreme Court of the United States

OCTOBER TERM, 1954

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

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No. 321

SHREVEPORT ENGRAVING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 423–433) has not yet been reported. The statement of the trial judge, in passing sentence upon petitioner, appears at R. 340–343.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 1, 1944 (R. 434) and a petition for rehearing (R. 435–443) was denied on July 7, 1944 (R. 444). The petition for a writ of certiorari was filed on August 5, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by

the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the power to allocate critical materials includes the power to restrict the use of such materials already owned by a processor.

2. Whether General Conservation Order M–9–c, an order signed by a subordinate official of the War Production Board, was issued pursuant to an improper delegation of authority under the Second War Powers Act.

3. Whether four specified comments of the trial judge in the course of the trial constitute reversible error.

STATUTES AND REGULATIONS INVOLVED

The Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat 176, 50 U. S. C. App., Supp. III, 631, *et seq.*), provides in part:

> SEC. 2 (a) (2): * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall

deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

SEC. 2 (a) (5): Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

SEC. 2 (a) (8): The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Section 1 of the Act of June 11, 1942, 56 Stat. 451 (50 U. S. C. App., Supp. III, 1101), provides in part:

* * * In addition to the powers and duties of the Chairman of the War Production Board defined by Executive Order Numbered 9024 of January 16, 1942, and by Executive Order Numbered 9040 of January 24, 1942, it shall be the duty of the Chairman of the War Production Board, and he is hereby empowered, through a deputy to be appointed by him, to mobilize

aggressively the productive capacity of all small business concerns, and to determine the means by which such concerns can be most efficiently and effectively utilized to augment war production.

By Executive Order No. 8629, dated January 7, 1941 (6 Fed. Reg. 191), the President conferred his power under Section 2 (a) of the Act of June 28, 1940, on the Office of Production Management, and thereafter by Executive Orders Nos. 9024, dated January 16, 1942 (7 Fed. Reg. 329), 9040, dated January 24, 1942 (7 Fed. Reg. 527), and 9125, dated April 7, 1942 (7 Fed. Reg. 2719–2720), the President conferred his power under Section 2 (a) of the Second War Powers Act on the War Production Board. By Executive Order No. 9125, the President confirmed War Production Board Regulation No. 1 of January 24, 1942 (7 Fed. Reg. 562), which, *inter alia,* lodged in the Director of Industry Operations authority to perform all functions and exercise all powers under Section 2 (a) of the Act. By amendment on July 9, 1942 (7 Fed. Reg. 5395), of War Production Board Regulation No. 1, the authority in that respect was transferred to the Director General for Operations.

General Conservation Order No. M–9–c, issued and effective October 21, 1941 (6 Fed. Reg. 5394), as amended effective December 26, 1942 (7 Fed. Reg. 10927), prohibited, in paragraph (f) (1), all use of copper and copper base alloy engraving

plates for certain purposes after December 31, 1942, and limited other uses. Users in the photoengraving business, like petitioner, were permitted under this conservation order, to use during each calendar quarter of 1943 sixty percent of the amount of copper used by them during the corresponding calendar quarter of 1940.

STATEMENT

On October 26, 1943, petitioner, a Louisiana photoengraving corporation with its principal place of business at Shreveport, Louisiana (R. 173), was charged in an information in the District Court of the United States for the Western District of Louisiana in three counts with violating Section 2 (a) of Title III of the Second War Powers Act, and General Conservation Order M–9–c issued thereunder (*supra,* pp. 2–3, 4–5). Each count charged that petitioner willfully and unlawfully made a separate use and processing of copper in excess of the applicable quota prescribed by the conservation order for the printing and publishing industry (R. 2–9). Petitioner's demurrer was overruled by the trial judge (R. 9–15), and a jury thereafter found petitioner guilty on counts 2 and 3 and not guilty on count 1 (R. 337, 417). The trial judge fined petitioner $1,500 on each of counts 2 and 3 (R. 340–343, 419). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the conviction was affirmed (R. 423–434).

The evidence adduced at the trial in support of the information is, in summary, as follows:

In connection with its business of processing and selling copper photoengraving plates (see R. 173), petitioner, in anticipation of the present war and the possible consequent shortage of materials, accumulated a large surplus inventory of copper plates (R. 179, 180, 247, 253). After the outbreak of the war, petitioner's business increased substantially (R. 39–43, 178, 181, 190, 251–252). Following the issuance of the conservation order limiting the 1943 use of copper to sixty percent of that used in 1940 (*supra*, p. 5), petitioner, in an effort to obtain permission to use copper in excess of the allowable quantities, pursued and exhausted the prescribed, as well as other, appeal procedures before the War Production Board (R. 45–46, 49–50, 51, 52, 54–55, 195–196, 308, 310, 311, 314, 343–369). That agency denied to petitioner the requested permission for excess use of copper plate (R. 360–361, 366–367). Petitioner's president was expressly informed and understood that he and it could not exceed the quota without prior written permission (R. 57–58, 59–60, 218, 219, 238) and that if it exceeded the established quota without such prior approval, it would be doing so at its "own risk" (R. 238, 241).

Under the provisions of the conservation order, petitioner's maximum quota for the first quarter of 1943 was 1,829 pounds of copper, and for the

second quarter of 1943, 1,737 pounds (R. 39, 353).[1] During the first quarter of 1943 petitioner used 5,352 pounds, and during the second quarter 4,558 pounds of copper (R. 40, 191).

ARGUMENT

1. Petitioner does not deny that it grossly exceeded the quota fixed by Conservation Order M–9–c. Instead, its principal contention is that, as applied to it, the order is not an appropriate exercise of the allocation power and that it therefore is without legal foundation. Petitioner reasons thusly: It possessed a supply of copper sufficient to meet its needs during the period covered by the information. That copper was not available for any defense purpose until it had been used by it and then disposed of as scrap. Accordingly, the effect of the conservation order on it was to prevent the copper from being used rapidly and then made available to defense industry as scrap. In petitioner's view, allocation must be made for defense; since the effect of the operation of the limitation order on petitioner was to delay the movement of copper into use for defense production, the order did not allocate for defense and was therefore not an appropriate exercise of the power conferred by Section 2 (a) of the Act (Pet. 4, 5, 10, 11–13). We submit that

[1] These figures represented 60 percent of the copper used by petitioner during the corresponding quarters of 1940, which was, respectively, 3,065 and 2,896 pounds (R. 39–43).

petitioner misconceives the scope of the allocation power and that his contention therefore is without merit.

Section 2 (a) (2) of Title III of the Second War Powers Act, *supra,* confers upon the President the power to allocate scarce materials needed for defense, or for private account, or for export "in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." Contrary to petitioner's assertion (Pet. 4, 5, 11), the Act does not limit the power conferred to "allocation for defense," *i. e.,* solely in the sense of allocations for defense uses, but rather, once the need for allocation is found to exist, the power may comprehend control or regulation of the remaining supply in the public interest and to promote the national defense. In a recent construction of another aspect of the allocation power this Court spoke of it as follows (*L. P. Steuart & Bro., Inc.* v. *Bowles et al.,* No. 793, last Term, decided May 22, 1944):

> * * * Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. That power of allocation or rationing might indeed be the only way of getting the right equipment to our armed forces in time. From the point of view of the factory

> owner from whom the materials were diverted the action would be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims of preference. The waging of war and the control of its attendant economic problems are urgent business. * * *

We think it just as clear that it cannot be said that the President lacks power under the Act to conserve the nation's stock pile of scarce materials for the purpose of making it available for future distribution for essential use. The power to allocate scarce materials necessarily includes within it the power to control the use of those materials prior to such distribution as well as afterwards. Any other conclusion would, indeed, make the power to allocate an empty one in so far as the public interest and promotion of the national defense are concerned. In short, as the court below concluded (R. 425), we think it plain that Section 2 (a) has "a meaning wide enough to comprehend and bring within its effective scope both the distribution and the use of on hand materials essential to the war effort, without regard to whose hands they were in or whether they were being held for use or for sale."

The nub of petitioner's argument is that it should be treated differently from other non-essential users of copper because it acquired a supply of copper prior to the imposition of limi-

tations on its use. To the contrary there is no reason for such a differentiation. Even as applied to petitioner's situation, Conservation Order M–9–c is an effective instrument in accomplishing the statutory purpose. For by limiting petitioner's use of copper, its present stock pile is made adequate to meet its needs for a longer period than if it were permitted to use copper without restriction, and it is thus removed from the market as a buyer of copper and the nation's already inadequate stock pile is left available for more essential users. In addition, petitioner's unuseable stock pile of scarce copper is conserved for distribution to essential users either in the event requisitioning becomes necessary, or in the event peitioner decides to sell its excess supply. Thus just as the allocation power permits the exclusion of a wasteful conduit from the distribution of scarce commodities (*L. P. Steuart & Bro.* v. *United States, supra*), so, we submit, it permits restrictions on nonessential users for the purpose of preventing the dissipation of such scarce commodities.

2. Petitioner asserts[2] (Pet. 4, 6, 10–11), but does not argue, that the delegation of authority

[2] Petitioner also asserts (Pet. 3, 9), without supporting argument, that at its trial the court would not permit it to show that there was an "arbitrary use of power in the Copper Division of the War Production Board." But resort to the record references relied upon by it (R. 45–71) shows only that petitioner was not permitted to inquire into the decisions in thousands of appeals before the War Production Board, and

under Section 2 (a) of the Act, which eventuated in the issuance of the conservation order by the War Production Board's Director of Industry Operations, was improper in that the President could not delegate his authority to the Chairman of the War Production Board because he was an officer whose office was "merely created by an Executive order" rather than "an officer of the Government, as contemplated by the Federal Constitution in article 2, section 2, clause 2," and that, in any event, the delegate of the President's power had no authority to redelegate the power to the Director of Industry Operations of the War Production Board. Aside from the fact that these assertions are not supported by argument by petitioner, they are without merit.

That the President was not limited to delegating his power to any particular class of officers is clear from the specific provision in the first statute, the Act of June 28, 1940, 54 Stat. 676, as amended by the Act of May 31, 1941, 55 Stat. 236, that the President may exercise the power, au-

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was limited instead to establishing the facts relating to its appeals. The facts in respect of its appeals were fully brought out at the trial and they showed that those appeals had been fully considered, that petitioner was accorded a hearing, and that the denial of the appeals was based on reason. In the circumstances, we submit that, as the trial judge held (R. 71, 73), the results in thousands of other cases none of which were shown to have any factual resemblance to petitioner's appeals, had no probative value in showing whether petitioner's appeals had been treated arbitrarily and that the court properly sustained government counsel's objection (R. 70–72) to such an inquiry.

thority, or discretion conferred on him through such department, agency, or officer of the Government as he may direct. In vesting the Chairman of the War Production Board with authority to exercise his allocation power (Executive Orders Nos. 9040 and 9125, *supra,* p. 4), the President authorized the Chairman to carry out his functions "through such officials or agencies and in such manner as he may determine, and his decisions shall be final." The Chairman, in the exercise of the discretion conferred upon him, delegated his allocation power to the Director of Industry Operations (see *supra,* p. 4.) Subsequent to these delegations Congress reenacted, with certain additions, in Section 2 (a) of the War Powers Act, the authority it had granted in the earlier Act, and it again authorized the President to exercise his authority through any agency, department, or officer of the Government. This reenactment was made with knowledge of the prior Presidential delegations.[3] Thereafter, in the Act of June 11, 1942, *supra,* p. 3) Congress specifically recognized and adopted Executive Orders Nos. 9024 and 9040 (*supra,* p. 3), in which the President made the basic delegations of au-

[3] On February 2, 1942, the Chairman of the War Production Board, pursuant to Senate Resolution No. 195, 77th Cong., 2d sess., Sen. Doc. No. 161, submitted to Congress a full report as to allocation orders issued by the Office of Production Management, predecessor of the Board, through its subordinate officials and disclosed the new types of orders contemplated.

thority. Accordingly, it is clear that Congress contemplated such delegations and that they were proper in the first instance.[4] In addition, the subsequent legislation operated as a congressional ratification of the action taken. *Hirabayashi* v. *United States,* 320 U. S. 81, *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 301–302; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147; *United States* v. *Heinszen and Co.,* 206 U. S. 370, 382; *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226; *Hamilton* v. *Dillin,* 21 Wall. 73; *Prize Cases,* 2 Black 635, 671.

3. Petitioner attacks (Pet. 5, 6, 11, 14–16) the trial judge's conduct of the trial, and in support of its claim of reversible error it relies on four comments by the judge, divorced from their context. We think the contention is so lacking in substance as not to merit detailed examination of each statement. Rather, we submit that when the statements are restored to their context and viewed in their proper setting, and that when it is noted that out of a record of over three hundred pages petitioner has been unable to find anything more prejudicial than the comments in question, it is clear that there is no substantial basis for petitioner's contention. In the words of the court below (R.

[4] Cf. *United States* v. *Chemical Foundation,* 272 U. S. 1; *O'Neal* v. *United States,* 140 F. (2d) 908 (C. C. A. 6), certiorari denied, April 24, 1944, No. 795; *United States* v. *Randall,* 140 F. (2d) 70 (C. C. A. 2); *Gallagher's Steak House* v. *Bowles,* 142 F. (2d) 530 (C. C. A. 2).

424), "* * * the record leaves in no doubt: that the orders and directives were not complied with; that the trial was fairly conducted; that no evidence was admitted which should have been excluded, none excluded which should have been admitted; that the charge of the court fairly submitted to the jury, and the jury fairly determined the issues raised by, the evidence; * * *."

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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